OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 91-9 August 9, 1991

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Guideline Memorandum Concerning Dubuque Packing Co., Inc., 303 NLRB No. 66

This memorandum supersedes General Counsel Memorandum 84-12, dealing with Otis Elevator, 269 NLRB 891 (1984).

Background

In Dubuque Packing Company, Inc., the Board held, inter alia, that the Employer violated Section 8(a)(5) of the Act by refusing to bargain with the Union concerning its decision to relocate unit work. The Board's holding was based on the conclusion that the Employer's decision to relocate was a mandatory subject of bargaining. In this case, the Board announced a new single standard for determining whether a decision to relocate is mandatory. 1/ In formulating this standard, the Board took into account the principles set forth in two Supreme Court decisions: First National Maintenance Corp. v. NLRB; 2/ and Fibreboard Corp. v. NLRB. 3/

In its original decision in Dubuque 4/ the Board adopted the judge's decision and recommended order, finding that under any of the views expressed in Otis Elevator Co., 269 NLRB 891 (1984), Dubuque Packing Company was not under an obligation to bargain with Local 150-A of the United Food and Commercial Workers Union

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1/ The standard set forth by the Board in Dubuque addressed only decisions to relocate unit work. The Board expressed no view as to what standard would be used in analyzing other category three management decisions, such as sales, automation, and non Fibreboard subcontracting, referred to in fn. 22 of First National Maintenance. Dubuque, fn. 8, slip op. p. 13. The Board made clear that its new standard was to apply to all pending cases in whatever stage. Id.

2/ 452 U.S. 666 (1981).

3/ 379 U.S. 203 (1964).

4/ 287 NLRB 499 (1987).

regarding its decision to relocate the hog kill and cut operations from its home plant in Dubuque, Iowa to a new facility in Rochelle, Illinois. On the Union's petition for review, the Court of Appeals concluded that the Board had not provided sufficient reasoning linking its factual findings to its legal conclusions. Accordingly, the Court remanded the case to the Board for further proceedings, urging the Board to seriously consider articulating a single, majority-supported test to determine whether a particular employer decision is subject to mandatory bargaining. In its Supplemental Decision on remand, the Board adopted a new test for determining whether bargaining is required over a relocation decision, overruled its prior decision and found that the Employer had violated the Act.

In its reconsideration of the legal issue posed, the Board turned for guidance initially to the Supreme Court's decisions in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), and Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964). In First National Maintenance the Court concluded that an employer's decision to terminate its maintenance contract with a nursing home constituted a decision to go partially out of business and was not a mandatory subject of bargaining. Relying heavily on Justice Stewart's concurrence in Fibreboard, the Court found that a partial closure decision represented one of the "third" type of management decisions enumerated in the concurrence. 5/ Such decisions have as their focus the economic profitability of the employer but have a direct impact on employment.

As to the decision at issue in First National Maintenance, the Court concluded that the focus of the decision - the profitability of the maintenance contract - was a concern wholly apart from the employment relationship. Although the decision had a direct and obvious impact on employees - the very existence of their jobs - it was a decision akin to a decision whether to be in business at all, a decision as to which no bargaining obligation attached. Applying a balancing test to take into account the amenability of the subject matter of the decision to the bargaining process and the burden which a bargaining

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5/ The first type of management decision as delineated by Justice Stewart and in First National Maintenance is that involving such matters as advertising, product type and financing which have only an attenuated impact on the employment relationship and which, consequently, do not trigger a bargaining responsibility. The second type of management decisions, those involving such matters as order of layoffs and recalls, production quotas and work rules, concerns itself nearly exclusively with the employment relationship and thus require employer bargaining, upon demand. 452 U.S. 676-677.

obligation would place upon management, the First National Maintenance Court concluded that:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. 6/

Conducting this balancing in the case before it, the First National Maintenance Court found that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...." First National Maintenance, 452 U.S. at 686. The Court reconciled this decision with Fibreboard where it had implicitly also balanced the benefits and the burdens, but where it struck a different balance by finding a subcontracting decision to fall on the side of the balance requiring bargaining. Unlike First National Maintenance, the subcontracting decision was based on labor costs, did not alter the basic operation and merely substituted another group of employees for the unit employees.

The Dubuque Test

Applying the rationale and balancing requirements of First National Maintenance and Fibreboard, the Board in Dubuque first concluded that relocation decisions as a class could not be labelled as mandatory or nonmandatory. Id. at 14. The Board then, by measuring the distinguishing facts in those two Supreme Court decisions, found that relocation decisions are closely analogous to the subcontracting decision in Fibreboard and are thus susceptible to resolution through collective bargaining. Id. at 16, 17. In this framework the Board set forth the following test for determining whether an employer's decision to relocate is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his

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6/ 452 U.S. at 679, quoting Fibreboard, 379 U.S. at 223 (Stewart, J., concurring).

> burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate. 7/

The implementation of this test will not require an engagement of the balancing process discussed in First National Maintenance. The underlying rationale finding that relocation decisons are amenable to the bargaining process, together with the test itself, strikes the balance.

The General Counsel has the initial burden in establishing the prima facie case by meeting a two part test. First, the General Counsel must establish that the employer's decision involved a relocation of unit work. Second, the General Counsel must establish that this relocation of unit work was unaccompanied by "a basic change in the nature of the employer's operation." 8/ If the General Counsel satisfy's this two part test, he will have established a prima facie case that the employer's decision to relocate was a mandatory subject of bargaining. The burden then shifts to the employer to rebut the General Counsel's prima facie case by establishing any one of the following: (1) "the work performed at the new location varies significantly from the work performed at the former plant"; or (2) "the work performed at the former plant is to be discontinued entirely and not moved to the new location"; or (3) "the employer's decision involves a change in the scope and direction

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7/ Dubuque, slip op. at pp. 17-18.

8/ Id., slip op. p. 17.

of the enterprise." 9/ Neither the prima facie case nor the rebuttal call for a consideration of the employer's motive underlying the relocation decision. As discussed below, motive is relevant only to the employer's affirmative defenses.

The elements of the employer's rebuttal parallel the elements of the General Counsel's prima facie case resulting in an intertwining of the proof of the prima facie case and the proof of the rebuttal. Therefore, evidence relevant to the rebuttal is also relevant to the prima facie case. Generally, the General Counsel should be prepared to introduce evidence in the prima facie case to establish: 10/

> (1) the bargaining unit work has not been discontinued and has been relocated to the new facility;
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> (2) there has not been a basic change in the nature of the operation;
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> (3) the bargaining unit work at the new facility does not vary significantly from the work performed at the former plant;
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> (4) the employer's decision does not involve a change in the scope and direction of the enterprise.

Cases decided under Otis which made an inquiry into whether there had been a change in the "nature and direction of the business" (Otis Elevator, 269 NLRB at 893) should be helpful in a consideration of both (2) and (4). 11/

9/ Id., slip op. p. 18.

10/ Because litigation strategy may vary from case to case, Regions may wish to reserve some of this evidence for rebuttal.

11/ In the following cases the Board found the decision turned on a significant change in the direction of the business: Columbia City Freight Lines, 271 NLRB 12 (1984) (where the decision to transfer work turned on the need to eliminate duplicative costs and services, to maximize usage of the fuel and equipment, and to become smaller because of the loss of a major customer); Boston Div. UOP, Inc., 272 NLRB 999 (1984) (where the decision to consolidate operations and subcontract certain work turned on the need to eliminate duplication of work, costs and services and to respond to the deteriorating

Even if the employer is unable to rebut the General Counsel's prima facie case, it may still show that the decision to relocate was a nonmandatory subject of bargaining by proffering an affirmative defense. The employer can establish an affirmative defense by showing by a preponderance of the evidence either of the following: (1) "that labor costs (direct and/or indirect) were not a factor in the decision"; or (2) "that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate". 12/

With respect to the first affirmative defense, the employer must establish "that labor costs (direct and/or indirect) were not a factor in the decision." 13/ Direct labor costs are normally understood to mean wages and fringe benefits while indirect labor costs involve traditional noneconomic items in a contract (e.g. seniority, manning requirements) which can have an economic impact. In evaluating whether the employer has made out this affirmative defense, the Board will "evaluate the factors which actually motivated the employer's relocation decision rather than to engage in a post decisional examination of potential justifications for the decision." 14/ Therefore, in order to sustain its burden, the employer must show its actual motivation in making its relocation decision. This can be shown by adducing evidence of: (1) the relevant factors contemporaneous with or pre-dating the decision itself; and (2) "what was actually in the minds of those making the decision." 15/ Therefore, the employer could establish this affirmative defense only if it could show that only non labor

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quality of the product caused by obsolete equipment); Kroger Co., Inc., 273 NLRB 462 (1984) (where the decision to close an operation and subcontract turned on the Employer's inability to compete because of its outmoded operation). Compare: Plymouth Stamping Division, 286 NLRB 890 (1987) (where the Board concluded that there the decision did not turn on a significant change in the direction of the business).

12/ Dubuque, slip op. p. 18.

13/ Id.

14/ Id., fn. 14, slip op. p. 19.

15/ Id.

cost considerations justifying the relocation were "relied on at the time the relocation decision was made." 16/

If the employer fails to establish that labor costs were not a factor in the decision to relocate, it may still avoid an unfair labor practice finding by showing evidence "that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." 17/ Under this second affirmative defense, the employer would prevail if it could show that, even if labor costs were a factor, it would have relocated anyway based upon non labor cost considerations. This defense is similar to the Wright Line 18/ defense in an 8(a)(3) case, differing in that the General Counsel is not required to establish in the prima facie case that labor costs were a factor. In order to meet this burden where the non labor costs considerations can be reasonably calculated on a dollar basis, the employer would have to establish that the union could not or would not offer concessions that "approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision." 19/ For example, the employer would meet its burden by demonstrating that by not relocating "the costs for modernization of equipment or environmental controls were greater than any labor cost concessions the union could offer." 20/ In some incidents the non labor costs considerations may not be susceptible to a monetary calculation. For example, an employer decides to relocate, in part, because of a desire to be closer to its customers, or to be domicile in a warmer or cooler climate, or to be in a less polluted area. If labor costs were also a factor in these situations, an employer may meet its burden under the second affirmative defense by establishing that it would have relocated even absent the labor costs considerations.

Where a decision to relocate is a mandatory subject of bargaining, "the employer's obligation will be the usual one of negotiating to agreement or a bona fide impasse." 21/ The Board

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16/ Id.

17/ Id., slip op. p. 18.

18/ Wright Line, 251 NLRB 1083 (1980); NLRB v. Transportation Management, 462 U.S. 393 (1983).

19/ Dubuque, slip op. p. 18.

20/ Id. and fn. 13, slip op. p. 19.

21/ Id., slip op. p. 20.

recognizes, however, that "there may be circumstances under which a relocation decision must be made or implemented expeditiously." 22/ Therefore, the Board will take "expedition" into consideration when considering "whether a bargaining impasse has been reached on the relocation question." 23/ Although the Board did not specifically mention the need for confidentiality, it indicated that it would still take such matters into consideration stating that "...the extent of the employer's obligation to notify the union and give it an opportunity to bargain will be governed by traditional 8(a)(5) criteria, taking into account any special or emergency circumstances as well as the exigencies of each case." 24/ Therefore, the Board will apply existing law in determining whether an employer has bargained in good faith given the employer's need for speed and confidentiality or other special or emergency circumstances. 25/

Investigating Relocation Cases Under Dubuque

When investigating a charge allegation that an employer unlawfully has refused to bargain regarding its decision to relocate bargaining unit work, under the Dubuque test as described above, the Region must initially determine whether unit work has, in fact, been relocated. If that element of the case is disputed, it will be necessary to investigate and identify the work performed in the unit at the old location and at the new location. This facet of the investigation may involve, among other things, reference to the Board certification, if any; pertinent collective bargaining agreements; employer and employee testimony regarding unit job duties, services provided, products produced; employer help wanted advertisements; employer job

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22/ Id. at 20.

23/ Id.

24/ Id.

25/ See Member Dennis's concurrence in Otis Elevator Co., supra, 269 NLRB at 897-899, discussing the weight to be accorded the employer's need for speed, flexibility, and confidentiality in determining whether a decision is amenable to resolution through collective bargaining, using as examples NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967)(threatened loss of major customer required company to take flexible, fast measures toward securing adequate facilities); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 195 (3d Cir. 1965)(company required by terms of sale to Housing Authority to close plant quickly or litigate question of market value in condemnation proceeding).

descriptions, employee handbooks and other relevant personnel documents. 26/

Evidence of the sort indicated should be obtained in the course of the Region's investigation.

a) The corporate ownership/structure of the employer.

i) documents pertaining to the sale/disposition of the old location and purchase or lease of the new location

ii) articles of incorporation filed with the Secretary of State of the state of incorporation; by-laws; SEC filings; prospecti; reports to shareholders; (before and after relocation)

iii) minutes of meetings of Board of Directors dealing with relocation

iv) income tax returns

v) correspondence explaining relocation to suppliers, customers, creditors, etc.

b) Identity of Employer management personnel and supervision

i) employer and employee testimony

ii) payroll and personnel records

c) Identity of products, and production process or services provided

i) employer and employee testimony

ii) advertisements or solicitations

iii) order forms, invoices, other documents evidencing nature of the Employer's business

d) Identity of suppliers, customers/clients and creditors.

i) employer and employee testimony

ii) order forms, bills of lading

26/ Deadlined requests for such documents, as particularized as possible, should be made as early in the investigation as it is determined that such evidence is necessary.

e) Identity of Work Skills

i) employer and employee testimony

ii) training programs

The most critical evidence concerning whether unit work has been relocated "unaccompanied by a basic change in the nature of the employer's operation" generally lies in the possession of the Employer. Thus, it is particularly appropriate to utilize investigative subpoenas where evidence from other sources points to a prima facie case 27/ and the Employer refuses to cooperate. 28/ With respect to investigation of an Employer's affirmative defenses that labor costs were not a factor or that the relocation would have taken place notwithstanding labor costs considerations, the Employer will be given an opportunity to present such evidence during the investigation. However, if the Employer refuses to cooperate and the Region has otherwise established that the work has been relocated without a basic change in the Employer's operation, it would not normally be necessary to issue an investigative subpoena to inquire into the Employer's affirmative defenses. In those situations the Region should issue complaint and absent settlement issue a trial subpoena seeking evidence concerning any labor cost affirmative defense the Employer might raise. 29/

Where the Employer's evidence establishes rebuttals or defenses recognized by Dubuque, complaint will not issue alleging a bargaining obligation with regard to the relocation. Evidence which predates or is contemporaneous with the relocation and which reflects the Employer's motivation for the relocation will be particularly relevant. Post relocation events can shed light on the Employer's motivation for its relocation decision; however, post hoc rationales for the relocation should be viewed skeptically.

Lastly, during the course of its investigation, the Region must consider Employer evidence and arguments that it satisfied

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27/ Casehandling Manual, ULP (Part One), section 10056.5.

28/ Consistent with long standing policy, lack of cooperation should be documented in the Regional Office File.

29/ If the Employer refuses to comply with the trial subpoena, the Employer can be precluded from offering any evidence or testimony concerning any labor cost affirmative defense. See Louisiana Cement Co., 241 NLRB 536, 537, fn. 2 (1979).

any obligation to bargain to impasse with respect to its decision to relocate.

Submitting Cases To Advice

The Board's test in Dubuque requires an essentially factual analysis in each case. After the Region makes the factual determinations required by the Dubuque test, its decision should be consistent with the principles set forth in this guideline memorandum. If the Region has any questions about how this Guideline memo is to be applied in any particular case, it may submit the case to Advice. In addition, the Region should submit cases to Advice involving speed and confidentiality or other special or emergency circumstances.

Other category three cases referred to in footnote 22 of First National Maintenance 30/ (e.g., sales, automation, non Fibreboard subcontracting) should be submitted to Advice.

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MEMORANDUM GC 91-9

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30/ 452 U.S. 666, 686.